IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 106

THE UNITED STATES OF AMERICA,

Appellant,

vs.

HERMAN ROSENWASSER, an individual, doing business under the firm name and style of PERFECT GARMENT COMPANY,

Appellee.

BRIEF OF APPELLEE.

VICTOR BERNSTOCK,
1127 Bartlett Building, Los Angeles 14,
Attorney for Appellee.

BERNARD B. LAVEN,
Of Counsel.

Parker & Company, Law Printers, Los Angeles Phone TR. 5206

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 106

THE UNITED STATES OF AMERICA,

Appellant

vs.

HERMAN ROSENWASSER, an Individual, doing business under the firm name and style of PERFECT GARMENT COMPANY,

Appellee.

BRIEF OF APPELLEE.

Question Presented.

The statement of the question as proposed by the government in its opening brief (B2) is too broad and avoids any reference to the criminal provisions of the Act in question. The main question should be limited to the requirement of a statute so as to charge a crime, and it is therefore subject to amendment so as to read:

> Does the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C., Sec. 207(a)(3) sufficiently and explicitly describe with appropriate definiteness that employees compensated at an *irregular rate* (piece rate employees) are subject to the criminal provision of the Act?

Contention of the Government.

The government has made the point in its opening brief for reversal of the order sustaining the demurrer of the appellee as follows:

> 1. That although the Fair Labor Standards Act does not explicitly provide that employees compensated at an *irregular rate* shall be subject to the Act, it was the intent of Congress to include them.

In answer to this point we respectfully submit:

That such a conclusion is mere speculation and the issue in this case involves far more than merely the intent of Congress. It involves the fundamental constitutional rights of an accused to justice which are guaranteed by the Fifth Amendment to the Constitution of the United States.[1]

The government's theory relating to the Act consists largely of generalities and assumptions, and the view of the Administrator of the Wage and Hour Division (B7). It is repugnant to common sense and sound reason to assume that the Administrator's opinion can extend or enlarge a statute by construction. *United States v. Cohen Grocery Co.*, 255 U. S. 81, 89.[2]

The presidential message of May 24, 1937, expressed the hope that employment might be spread "among those

---

[1]Due Process of Law:

"* * * nor be deprived of life, liberty or property without due process of law; * * *."

Due process of law in a criminal proceeding has been defined as consisting of "a law creating or defining the offense * * *." *Simons v. U. S.*, 119 F. (2d) 539, 544. Certiorari denied, 316 U. S. 616.

[2]See also *U. S. v. Grimaud*, 220 U. S. 506, 520, 523.

groups in which unemployment today principally exists." 1941 Wage and Hour Man. 747, 749.

The Committee reports[3] upon the bill which became the Fair Labor Standards Act, makes it clear that the only purpose of the proposed act was to increase employment, to require a fair day's pay for a fair day's work by raising the wages of the most poorly paid workers and reducing the hours of those most overworked, and thus correct inequalities in the cost of producing goods and prevent unfair competition in commerce.

The history of the Act is consistent and clearly indicates that Congress never intended to include piece rate employees in the original Act and did not deem them subject to regulation. Congress can readily remedy the Act as it did in 1940 by an amendment[4] (Sec. 6(a)(5)) to specifically include piece rate employees. This amendment expresses Congress' intention to limit piece workers to the Virgin Island and Puerto Rico and it must have deemed that the piece rate workers in the United States were being adequately compensated, otherwise it would have made provision for them.

The Act does not provide that the Administrator or the Court are to define "regular hour" by regulation. There is nothing in the words of the Act to suggest that Congress intended to include piece rate employees other than those specifically mentioned (Sec. 29, U. S. C. 206(a)(5).)

---

[3]H. R. 1452, 75th Cong., 1st Sess.; H. R. 2182, 75th Cong., 3d Sess.; S. R. 884, 75th Cong., 1st Sess.

[4]Amendments dealing specifically with wage orders applicable to Puerto Rico and Virgin Islands were adopted in the Act of June 26, 1940, c. 432, Sec. 3; 54 Stats. 615.

The Act does not define piece work and is devoid of any subject other than minimum wages and hours of work and this Court has construed it as dealing only with these subjects. (*United States v. Darby*, 312 U. S. 100, 115, 117, 122, 125.)

The government has labored to show that piece rate employees are subject to the Act, in that it has been held in numerous decisions that piece rate employees are not exempt (B14), and has cited several cases, but none of them meet the issue of the definiteness and certainty required of a statute to charge a crime. The precise point, involving this Act, was not before the Court in any of the decisions, and there is nothing in conflict with the construction of the statute for which we contend. There is not one word which we can find in any of the cases cited that has application to the Constitutional guarantees under the Fifth Amendment. All interpreted the civil liabilities of the Act. The distinction between civil and criminal liability is of vital importance in determining whether the Act sufficiently defines piece rate employees. The requirements of each is essentially different.

We do not contend that Congress does not have authority to legislate as to piece rate employees but only that the uncertainty of the Act, pertaining to the criminal provisions, affects the fundamental rights and liberty of citizens.

Government counsel are asking this Court to so construe the Act as to make it applicable even though Congress has not seen fit to include piece rate workers. The argument at (B9, 13, 14) of the government's brief, is one that should be directed to Congress and not to a judicial tribunal.

Argument.

We must keep in mind the zealous safeguards provided in the Constitution to protect an individual charged with a crime. There are no common law crimes punishable by the Federal Government and before one can be charged with a criminal act, the act charged must be clearly and unmistakably within the provisions of a Federal penal statute. These may not be enlarged by construction to include kindred acts which the courts may consider as reprehensible as those denounced by the statute. (*Fasulo v. United States*, 272 U. S. 620.)

New situations may call for a new application of statutory and constitutional provisions but that does not mean that the plain terms of a penal statute may be extended by judicial construction to include persons or acts not within the scope when it was originally passed. (*Fasulo v. United States*, *supra*.) However desirable it might be to have the law include piece-rate employees, it is not the province of the Court in a criminal case to create an offense by construction. (*Arnold v. U. S.*, 115 F. (2d) 523.) The words of the statute must be such as to leave no reasonable doubt as to the intention of the legislature and where there is any well founded doubt as to any act being a public offense, it should not be declared such. (*McFarland v. United States*, 19 F. (2d) 807, 808.)[5]

It is an established principle that penal statutes must be certain and that before one may be lawfully punished thereunder his case must be clearly within the provisions

[5] *Cf. Securities Exchange Commission v. C. M. Joiner Leasing Corp., et al.*, 320 U. S. 345, 354, 355.

of the statute. Any doubt as to its meaning must be resolved in favor of the liberty of the citizen. (*U. S., v. Wiltberger*, 5 Wheaton 73, 5 L. Ed. 37; *Connally v. General Construction Co.*, 269 U. S. 385; *U. S. v. Noveck*, 271 U. S. 201; *U. S. v. Katz*, 271 U. S. 354; *Fasulo v. U. S., supra*; *Pierce v. U. S.*, 314 U. S. 306.)

There are many possible interpretations of the phrase "regular rate"[6] and it was never intended by Congress that those who might be subject to the Act should be required to calculate any other formula than that which was provided, namely, one and one-half times the *regular rate* at which he is employed. Sec. 7(a)(3). The test is whether the statute is clear, plain and unmistakably understandable by citizens of average intelligence. This uncertainty was a determinative factor which prompted the District Court judge to sustain the demurrer [R. 16; 17] so as to protect the fundamental guarantees that cannot be destroyed without the destruction of the essential features of our government and that are guarantees, and protect, at all times, people charged or suspected of crimes, by those holding positions of power and authority.

Human liberty, as guaranteed by the United States Constitution,[7] is too precious to permit an invasion without explicitly informing all who are subject to a statute, what acts it is their duty to avoid. (*U. S. v. Brewer*, 139 U. S. 278, 288; *Pierce v. U. S., supra*; *U. S. v. McDermott*, 131 F. (2d) 313, certiorari denied 318 U. S. 765.)

---

[6]52 Yale L. J. 159 (1942).

[7]Fifth Amend. to U. S. Constitution.

Conclusion.

The protection of the Constitutional rights of citizens is required, if due process is to remain a living force and not become an empty theory in the conduct of criminal prosecutions.

We submit the law fully justified the District Court in its ruling.

The judgment of the District Court should be affirmed.

VICTOR BEHRSTOCK,
Attorney for Appellee.

BERNARD B. LAVEN,
Of Counsel.

APPENDIX.

The pertinent provisions of the Fair Labor Standards Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C., Sec. 201 *et seq.*, are as follows:

* * * * * * * * *

Sec. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct, and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

* * * * * * * * *

Sec. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

* * * * * * * * *

(5) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers.

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

(c) The provisions of paragraphs (1), (2), and (3) of subsection (a) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands engaged in commerce or in the production of goods for commerce only for so long as and in so far as such employee is covered by a wage order issued by the Administrator pursuant to the recommendations of a special industry committee appointed pursuant to section 5 (c).[1]

* * * * * * * * *

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

[1] Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

* * * * * * * * *

SEC. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

* * * * * * * * *

SUPREME COURT OF THE UNITED STATES.

No. 106.—October Term, 1944.

The United States of America, Appellant, *vs.* Herman Rosenwasser, an Individual, Doing Business Under the Firm Name and Style of Perfect Garment Company.	Appeal from the District Court of the United States for the Southern District of California.

[January 2, 1945.]

Mr. Justice Murphy delivered the opinion of the Court.

This is a direct appeal from a judgment of the District Court for the Southern District of California. That court sustained appellee's demurrer to an information charging violations of the minimum wage, overtime and record-keeping provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. § 201 *et seq.* This was done on the ground that the Act is inapplicable where employees are compensated at piece rates, as is the case in appellee's garment business. We are thus met with the clear issue of whether the Act covers piece rate employees so as to subject their employers to its criminal provisions.

Neither the policy of the Act nor the legislative history gives any real basis for excluding piece workers from the benefits of the statute. This legislation was designed to raise substandard wages and to give additional compensation for overtime work as to those employees within its ambit, thereby helping to protect this nation "from the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health." Sen. Rep. No. 884 (75th Cong., 1st Sess.) p. 4; *United States* v. *Darby*, 312 U. S. 100. No reason is apparent why piece workers who are underpaid[1] or who work long hours

[1] The Government points out that United States Department of Labor statistics show that 25.5% to 48.5% of the unskilled workers paid under the piece rate or incentive systems in six industries (boot and shoe, knitted outerwear, knitted underwear, seamless hosiery, full fashioned hosiery and work and knit gloves) received less than 30 cents an hour at approximately the time of the passage of the Act.

do not fall within the spirit or intent of this statute, absent an explicit exception as to them. Piece rate and incentive systems were widely prevalent in the United States at the time of the passage of this Act[2] and we cannot assume that Congress meant to discriminate against the many workers compensated under such systems. Certainly the evils which the Act sought to eliminate permit of no distinctions or discrimination based upon the method of employee compensation and none is evident from the legislative history.

The plain words of the statute give an even more unmistakable answer to the problem. Section 6(a) of the Act provides that "every employer" shall pay to "each of his employees who is engaged in commerce or in the production of goods for commerce" not less than specified minimum "rates," which at present are "not less than 30 cents an hour." Section 7(a) provides that "no employer" shall employ "any of his employees" for longer than specified hours in any week without paying overtime compensation "at a rate not less than one and one-half times the regular rate at which he is employed." The term "employee" is defined in Section 3(e) to include "any individual employed by an employer," with certain exceptions not here pertinent being specified in Section 13, and the term "employ" is defined in Section 3(g) to include "to suffer or permit to work."

A broader or more comprehensive coverage of employees within the stated categories would be difficult to frame. The use of the words "each" and "any" to modify "employee," which in turn is defined to include "any" employed individual, leaves no doubt as to the Congressional intention to include all employees within the scope of the Act unless specifically excluded.[3] And "each"

[2] The Government farther points out that large percentages of workers are paid on a straight piece basis in the following industries: boot and shoe, boot and shoe cut stock and findings, hosiery, knit goods, hat industries, gloves, cigar, furniture, leather and meat packing. It also states that studies made in 1935, covering a cross section of industry including 631 manufacturing establishments employing 700,699 wage earners, indicated that 22.1% were employed at straight piece rates and an additional 21.6% on some premium or bonus system. Another study made in 1939 revealed that 61.6% of the workers in 300 companies studied were paid according to an incentive system. National Industrial Conference Board, Studies in Personnel Policy, No. 19, Some Problems in Wage Incentive Administration, p. 11, Table 4.

[3] Sen. Rep. No. 884 (75th Cong., 1st Sess.) p. 6, states that the term "'employee' is defined to include *all* employees. . . ." (Italics added.) Senator Black said on the floor of the Senate that the term "employee" had been given "the broadest definition that has ever been included in any one act." 81 Cong. Rec. 7657.

and "any" employee obviously and necessarily includes one compensated by a unit of time, by the piece or by any other measurement.[4] A worker is as much an employee when paid by the piece as he is when paid by the hour. The time or mode of compensation, in other words, does not control the determination of whether one is an employee within the meaning of the Act and no court is justified in reading in an exception based upon such a factor. When combined with the criminal provisions of Sections 15 and 16, the unrestricted sweep of the term "employee" serves to inform employers with definiteness and certainty that they are criminally liable for willful violations of the Act in relation to their piece rate employees as well as to their employees compensated by other methods. *See United States* v. *Darby*, *supra*, 125, 126.

The fact that Section 6(a) speaks of a minimum rate of pay "an hour," while Section 7(a) refers to a "regular rate" which we have defined to mean "the hourly rate actually paid for the normal, non-overtime workweek," *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. — (slip-sheet opinion, p. 3), does not preclude application of the Act to piece workers. Congress necessarily had to create practical and simple measuring rods to test compliance with the requirements as to minimum wages and overtime compensation. It did so by setting the standards in terms of hours and hourly rates. But other measures of work and compensation are not thereby voided or placed outside the reach of the Act. Such other modes merely must be translated or reduced by computation to an hourly basis for the sole purpose of determining whether the statutory requirements have been fulfilled. *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 579; *Walling* v. *Helmerich & Payne, Inc.*, *supra* (slip-sheet opinion, p. 3). These hourly standards are not so phrased as reasonably to mislead employers into believing that the Act is limited to employees working on an hourly wage scale. Nor can a court rightly use these standards

[4] The Act of June 26, 1940, c. 432, Sec. 3, 54 Stat. 615, added Section 6(a)(5) to the Fair Labor Standards Act. This new section makes provision for establishing minimum piece rates by regulation or order for homework in Puerto Rico and the Virgin Islands. This is evidence of a Congressional intent to include workers of this type within the Act and a recognition that without this special provision homeworkers in Puerto Rico and the Virgin Islands paid by the piece would be subject to the ordinary statutory provisions relating to minimum wages.

as a basis for cutting off the benefits of the Act from employees paid by other units of time or by the piece. If that were permissible, ready means for wholesale evasion of the Act's requirements would be provided.

It follows that the court below erred in sustaining appellee's demurrer to the information. Its judgment is

Reversed.

Mr. Justice ROBERTS dissents.